

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.E., Appellant**

**and**

**DEPARTMENT OF TRANSPORTATION,  
Austin, TX, Employer**

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**Docket No. 11-2088  
Issued: May 7, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 23, 2011 appellant filed a timely appeal from a March 31, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant sustained permanent impairment warranting a schedule award.

**FACTUAL HISTORY**

On May 26, 2009 appellant, then a 47-year-old motor carrier safety specialist, was injured when she fell on her back and hit her head while exiting her truck. OWCP accepted a

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

lumbar sprain. Appellant stopped work after the injury and received appropriate continuation of pay and wage-loss compensation until she returned to restricted work on August 17, 2009.

From May 29 to June 7, 2012 appellant was initially treated by Dr. Daniel Guerra, a family practitioner, for head, neck and back injuries sustained after a fall at work. In work status reports dated May 29 to September 15, 2010, Dr. Guerra diagnosed head contusion, contusion of the neck/thorax and lumbar strain. He returned appellant to work with restrictions on August 24, 2009 and to regular duty on March 2, 2010. On September 15, 2010 Dr. Guerra determined that appellant reached maximum medical improvement. A July 15, 2009 magnetic resonance imaging (MRI) scan of the lumbar spine revealed mild bilateral foraminal disc bulges at L5-S1 causing mild narrowing of the bilateral neural foramina. Appellant was also treated by Dr. Dennis Slavin, a Board-certified anesthesiologist, from January 5 to September 14, 2010, for persistent low back pain after a work injury. He diagnosed myofascial pain syndrome and recommended trigger point injections.

On September 29, 2010 appellant was seen by Dr. Lionel Moreno, a Board-certified family practitioner, who noted a history of injury and advised that appellant was asymptomatic except for minor neck pain. Dr. Moreno opined that appellant sustained five percent impairment of her back pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> He noted that appellant was at maximum medical improvement and would fall into a lumbosacral Category II for a bulging disc at L5-S1, for five percent impairment. On December 23, 2010 appellant filed a claim for a schedule award.

In a January 18, 2011 report, an OWCP medical adviser noted that Dr. Moreno's impairment rating was not probative as the spine was not a scheduled member upon which a schedule award could be made pursuant to FECA. He further noted that the rating should use the sixth edition of the A.M.A., *Guides*.<sup>3</sup> The medical adviser recommended referring appellant for a second opinion examination.

OWCP referred appellant to Dr. Jorge E. Tijmes, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 15, 2011 report, Dr. Tijmes reviewed appellant's history of injury and described his findings on examination. Appellant had normal neck range of motion, palpation of the paravertebral muscles was supple, reflexes at the biceps, triceps, extensor, carpi ulnaris and carpi radialis were normal, muscle strength at the extensor carpi radialis, carpi ulnaris, pollicis longus and flexors was normal and distal sensation and circulation was normal. He further noted examination of the upper back was normal, paravertebral muscle palpation was supple, examination of the lower back revealed mild tenderness to palpation with mild paravertebral muscle spasms bilaterally, range of motion was limited, straight leg raising was negative bilaterally, both hips, knees and ankles were normal, distal sensation and circulation was normal, reflexes were normal, equal and reactive and muscle testing at extensor hallucis longus, anterior tibialis, extensor hallucis communis, extensor digitorum communis and

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<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

gastrocnemius was normal. Dr. Tijmes noted that x-rays of the lumbar spine revealed normal lordosis, intervertebral disc height, with no fractures, dislocations or subluxations seen. He diagnosed low back pain. Dr. Tijmes opined that, pursuant to the A.M.A., *Guides*, appellant had no lumbar radiculopathy, no sensory or motor deficits and therefore no impairment for peripheral nerve pathology. He noted no impairment was applicable for complex regional pain syndrome. Dr. Tijmes concluded that appellant sustained no permanent impairment due to the accepted injury. He noted that appellant reached maximum medical improvement on March 15, 2011.

On March 31, 2011 OWCP denied appellant's claim for a schedule award.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>4</sup> and its implementing federal regulations,<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup> For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.<sup>8</sup>

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.<sup>9</sup> FECA and the implementing regulations do not provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.<sup>10</sup> The Board notes that section 8101(19) specifically excludes the back from the definition of organ.<sup>11</sup> However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.<sup>12</sup>

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>8</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>9</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>10</sup> *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>11</sup> 5 U.S.C. § 8101(19).

<sup>12</sup> *Thomas J. Engelhart*, *supra* note 9.

## ANALYSIS

On appeal, appellant contends that she is entitled to a schedule award. OWCP accepted her claim for a lumbar sprain. FECA does not provide for a schedule award based on impairment to the back or spine. Appellant may only be granted a schedule award for impairment to the lower extremities if such impairment is established as being caused by her accepted lumbar condition.

Appellant submitted a September 29, 2010 report from Dr. Moreno, who opined that appellant had five percent impairment of the whole person based on the fifth edition of the A.M.A., *Guides*.<sup>13</sup> The Board has carefully reviewed Dr. Moreno's report and notes that his findings do not support any permanent impairment of the upper or lower extremities. Dr. Moreno's examination did not reveal significant sensory loss, motor loss or reflex changes in the lower extremities. He did not reference any tables or charts in the sixth edition of the A.M.A., *Guides*, and he did not attribute any impairment to a scheduled body member as a result of the accepted condition. Dr. Moreno did not explain how appellant's lumbar condition caused impairment to either lower extremity or provide an adequate description of her physical condition so that an impairment rating could be determined by an OWCP medical adviser. His rating is of limited probative value and is insufficient to establish a basis for the payment of a schedule award.<sup>14</sup>

OWCP referred appellant to Dr. Tijmes who found that appellant had no permanent impairment due to her accepted injury. Dr. Tijmes noted active and equal reflexes with no significant muscle weakness in either leg and no sensory loss or significant hypesthesia. Appellant had mild paravertebral muscle spasms in the low back but straight leg raising was negative bilaterally, with distal sensation was normal in the lower extremities. Dr. Tijmes diagnosed low back pain. He found that appellant did not have any lumbar radiculopathy, no sensory or motor deficits in either extremity related to her lumbar spine pathology and therefore no basis for rating any impairment based on appellant's accepted condition. Dr. Tijmes further noted no impairment was applicable for complex regional pain syndrome. He found no basis to rate impairment of a scheduled body member under the A.M.A., *Guides*, based on the accepted condition. The Board finds that his opinion constitutes the weight of the medical evidence of record on the issue of permanent impairment.

As there is no medical evidence in conformance with the A.M.A., *Guides*, supporting ratable impairment of a scheduled body member, causally related to the accepted condition, OWCP properly denied appellant's claim for a schedule award.

On appeal, appellant contended that she is entitled to a schedule award. As noted, Dr. Moreno did not attribute any impairment to a scheduled member, such as appellant's legs, as

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<sup>13</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001). As noted, *supra* note 8, OWCP began using the sixth edition of the A.M.A., *Guides* effective May 1, 2009.

<sup>14</sup> See *Carl J. Cleary*, 57 ECAB 563, 568 at note 14 (2006) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

a result of the accepted lumbar sprain. He did not explain how appellant's lumbar condition caused impairment to either lower extremity. OWCP referred appellant to Dr. Tijmes who considered the medical evidence and found no basis to rate impairment of the legs due to appellant's accepted condition. The Board also notes that factors such as employability or limitations on daily activities have no bearing on the calculation of a schedule award.<sup>15</sup>

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant did not establish that she sustained permanent impairment of her lower extremity based on her accepted lumbar condition.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> *Kimberly M. Held*, 56 ECAB 670 (2005).